90-1206

No. _____

Supreme Court, U.S.
FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

ELDA VILLARREAL

*Petitioner,*

v.

HARTE-HANKS COMMUNICATIONS, INC.,
EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY,
GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, &
ROBERT E. RHODES

---

**On Petition for Writ of Certiorari to the Texas Court of Appeals, Thirteenth District**

---

## PETITION FOR WRIT OF CERTIORARI

---

PAUL DODSON *
WHITE, HUSEMAN, PLETCHER
& POWERS
P.O. Box 2707
Corpus Christi, TX 78473
(512) 883-3563

WILLIAM J. KOLB
500 Texas Commerce Plaza
Corpus Christi, TX 78470
(512) 884-9986

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Does the free press clause of the First Amendment require the trial and appellate courts to defer to a jury's characterization of a libeled plaintiff as a public official?

2. Does the free press clause of the First Amendment prohibit a state from compensating a defamed child welfare worker without supervisory or policy responsibilities on the grounds that she is a public official?

## LIST OF ALL PARTIES

ELDA VILLARREAL, Petitioner in this Court and plaintiff and appellant in the courts below.

HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, the CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, and ROBERT E. RHODES, Respondents in this Court and defendants and appellees in the courts below.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF ALL PARTIES | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Facts Material to the Consideration of the Questions Presented | 2 |
| B. Preservation of Federal Questions Presented for Review | 7 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. DOES THE FREE PRESS CLAUSE OF THE FIRST AMENDMENT REQUIRE THE TRIAL AND APPELLATE COURTS TO DEFER TO A JURY'S CHARACTERIZATION OF A LIBELED PLAINTIFF AS A PUBLIC OFFICIAL? | 7 |
| II. DOES THE FREE PRESS CLAUSE OF THE FIRST AMENDMENT PROHIBIT A STATE FROM COMPENSATING A DEFAMED CHILD WELFARE AGENT WITHOUT SUPERVISORY OR POLICY RESPONSIBILITIES ON THE GROUNDS THAT SHE IS A PUBLIC OFFICIAL? | 9 |
| CONCLUSION | 12 |

TABLE OF CONTENTS—Continued

Page

APPENDIX A: PROCEEDINGS ON APPEAL

Opinion of the Court of Appeals ..... 1a

Judgment of the Court of Appeals (dated March 8, 1990) ..... 11a

Order of the Court of Appeals overruling motion for rehearing (dated April 19, 1990) ..... 15a

Order of the Texas Supreme Court denying application for writ of error (dated October 31, 1990) ..... 17a

APPENDIX B: PRESERVATION OF FEDERAL QUESTIONS

Motion for Partial Summary Judgment (filed November 23, 1987) ..... 18a

Excerpts from Elda Villarreal's objections to the jury charge (dated November 9, 1988) ..... 23a

Motion to Disregard Unsupported and Immaterial findings Pursuant to T.R.C.P. 301 (filed November 14, 1988) ..... 26a

Excerpts from Brief of Appellant (filed June 15, 1989) ..... 35a

APPENDIX C: TRIAL COURT PROCEEDINGS

Charge of the Court (filed November 10 and 11, 1988) ..... 43a

Final Judgment (dated January 16, 1989) ..... 55a

APPENDIX D: LIBELOUS ARTICLE

*Child Welfare has long file on sisters,* Corpus Christi Times, February 8, 1985 ..... 55a

## TABLE OF AUTHORITIES


| *CASES:* | Page |
|---|---|
| *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) | 11 |
| *Guinn v. Texas Newspapers, Inc.*, 738 S.W.2d 303 (Tex. App.—Houston [14th Dist.] 1987, writ denied), *cert. denied*, —— U.S. ——, 109 S.Ct. 864 (1989) | 12 |
| *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S.Ct. 2678 (1989) | 9 |
| *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) | 12 |
| *Marcone v. Penthouse Internat'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1984), *cert. denied*, 474 U.S. 864 (1985) | 8, 11 |
| *Milkovich v. Lorain Journal Co.*, —— U.S. ——, 110 S.Ct. 2695 (1990) | 9 |
| *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) | 9, 12 |
| *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) | 9 |
| *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) | 12 |
| *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), *cert. denied*, 454 U.S. 964 | 8 |
| *Rosenblatt v. Baer*, 383 U.S. 75 (1965) | 8, 10, 11 |
| *Roth v. United States*, 354 U.S. 476 (1957) | 9 |
| *Wilkinson v. Florida Adult Care Ass'n, Inc.*, 450 So.2d 1168 (Fla. App. 1984) | 12 |
| *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979) | 8 |

| *STATUTES AND RULES:* | |
|---|---|
| 28 U.S.C. § 1257(a) | 2 |
| U.S. CONST. amend. I | 2 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

No. ———

---

ELDA VILLARREAL

*Petitioner*,

v.

HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, & ROBERT E. RHODES

---

**On Petition for Writ of Certiorari to the Texas Court of Appeals, Thirteenth District**

---

## PETITION FOR WRIT OF CERTIORARI

---

ELDA VILLARREAL petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals, Thirteenth District, in this case.

### OPINIONS BELOW

The opinion of the Texas Court of Appeals, Thirteenth District, is reported as *Villarreal v. Harte-Hanks Communications*, 787 S.W.2d 131 (Tex. App.—Corpus Christi 1990, writ ref'd).

### JURISDICTION

The judgment of the Texas Court of Appeals was entered on March 8, 1990, and appellant Villarreal's motion for rehearing in that court was overruled on April 19, 1990. The Texas Supreme Court refused to consider the

cause by its order denying writ of error on October 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the free press clause of the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

## STATEMENT OF THE CASE

### A. Facts Material to the Consideration of the Questions Presented

On February 8, 1985, Greg Fieg-Pizano and Harte-Hanks Communications libeled Elda Villarreal. In a story appearing in the Corpus Christi Times, reporter and publisher accused Mrs. Villarreal of dereliction of her duties in a case of serious child abuse:

> Though police files dating to 1982 cite the 12 year old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25th.

The article went on to state that two pre-teenage girls were found to have "perforated hymens" and "enlarged vaginas" as a result of being prostituted by their parents. But because his story was "not about Elda Villarreal," the reporter omitted that Mrs. Villarreal only began working on the children's case on January 23 and that all officials involved in the case agreed that her handling of the file was exemplary.

The newspaper story destroyed Mrs. Villarreal's life and her position with the Texas Department of Human Resources (TDHR). After it appeared, she was ostracized at her work with TDHR's Child Protective Services (CPS), and TDHR fired her. Even though a court reinstated her in her job, she was "treated like a pariah" by her fellow workers when she returned to her job. Increasingly isolated and distraught, she ultimately resigned. At the time of trial in November, 1988, she was still undergoing psychiatric treatment and was under medication to treat the depression, anxiety, and distress caused by the Times article.

The jury found that the story was defamatory and that the publisher should have known that the story was substantially false. The jury found that Mrs. Villarreal had been embarrassed and humiliated by the published falsehood. The jury valued the injury to Mrs. Villarreal's reputation and character at $160,000.00.

But the jury found that Mrs. Villarreal was a "public official" and that the story was not published with malice. As a result of these two findings, Mrs. Villarreal was adjudged to take nothing by her suit. What high official position did Mrs. Villarreal hold that cost her the right to receive just compensation for the irreparable damage to her good name?

Mrs. Villarreal was a CPS worker with the TDHR, and strict confidentiality guidelines governed her in all her dealings with the public. Mrs. Villarreal had no independent authority to initiate an investigation into an allegation of child abuse. She could not investigate any allegation of child abuse unless her supervisor told her to do so. Every action Mrs. Villarreal performed had to conform to strict "policy requirements and standards" which she had no role in formulating.

On January 23, 1985, Mrs. Villarreal's supervisor ordered her to investigate a report of child abuse. Pur-

suant to these instructions, Mrs. Villarreal interviewed a counselor, assistant principal, and principal at the children's elementary school, and she also interviewed the children. After these interviews, she made an oral report to her supervisor about the abuse which she had discovered. Her supervisor approved Mrs. Villarreal's recommendations to place the children in foster care the next day.

On January 24, 1985, Elda Villarreal again discussed the foster care placement of the children with her supervisor before taking any action. After the supervisor approved the plan, Mrs. Villarreal delivered the children to their foster care and, as required by law, went to the Nueces County Courthouse to report the placement to the Nueces County Attorney's Office. As instructed by her supervisor, Mrs. Villarreal then waited until a district judge signed emergency orders granting care of the children to TDHR. After the judge signed the orders, Mrs. Villarreal brought copies back to her office as she had been instructed. The supervisor reviewed the documents to make sure Mrs. Villarreal had carried out all of her duties appropriately. The supervisor also asked her if she had contacted the police, as required by law, and whether she had enough information for a written police report. Mrs. Villarreal told the supervisor that she had gathered enough information and had made an oral report.

It is not disputed that Mrs. Villarreal followed policy and procedure in investigating and removing the children as instructed by her supervisor within twenty-four hours of receiving the case.

On January 25, 1985, in compliance with TDHR policy, Mrs. Villarreal began work on a case service plan for the children. On January 31, 1985, Mrs. Villarreal testified at a hearing on temporary orders for the children. On February 6, 1985, Sgt. Hugo Stimmler of the

Corpus Christi Police Department took a written report from Mrs. Villarreal regarding the children. Mrs. Villarreal made it clear to Sgt. Stimmler that she had only handled the case since January 23, 1985.

On the morning of February 7, 1985, Greg Fieg-Pizano, a reporter for the Caller-Times Publishing Company, saw the typewritten version of the report taken by Sgt. Stimmler at the Corpus Christi Police Department. Fieg-Pizano knew from his first conversation with Sgt. Stimmler that Elda Villarreal had only had this case a short time and in that time had taken all the appropriate steps to protect the children. Fieg-Pizano had never heard of Mrs. Villarreal before that time, and he could not recall any public events or controversies that Mrs. Villarreal had been involved in prior to February 7. Fieg-Pizano had no interest whatsoever in Elda Vilarreal's qualifications as a CPS worker or her performance of her job because "it wasn't relevant" to the story he was composing.

Fieg-Pizano wrote an article on the children which appeared on the front page of the Corpus Christi Times on February 7, 1985. The article did not mention Elda Villarreal. A second article by Fieg-Pizano appeared in the first edition of the Times on February 8. This article once again appeared on page 1 and once again did not mention Elda Villarreal. In that day's second edition, however, Mrs. Villarreal's name was mentioned in the press for the first time, and she stood accused before the city as negligent in the performance of her job.

No one at the Caller-Times Publishing Company considered the effect the article would have on Elda Villarreal. Even though the writer knew that Mrs. Villarreal had only recently begun work on the children's case and had taken all the appropriate steps to protect the children, he nevertheless withheld those facts because "this wasn't a story about Elda."

At the time he libeled Mrs. Villarreal, the writer had no concern with Mrs. Villarreal or her qualifications or performance for her work:

> Q: You knew from the very first conversation with Sgt. Hugo Stimmler that she had had this case a short time; is that correct?
>
> [Mr. Fieg-Pizano]: That's right.
>
> * * * *
>
> Q: And you knew that in that short time she had taken all the appropriate steps to protect these children.
>
> A: I never knew anything different than that.
>
> Q: Did you make any attempt to get any background information on Elda Villarreal?
>
> A: I tried to—to contact—I believe I tried to contact her, but I don't remember whether it was to get background information.
>
> Q: Well, why didn't you wanna get some background information about Elda Villarreal?
>
> A: Well, 'cause this is not a story about Elda. This is a story about two children who were abused, and the focus of this article was the children.
>
> Q: So, you weren't interested at all in her qualifications and in her performance on her job.
>
> A: This wasn't an article about Elda. This was an article about the children and what had happen[ed] to the children.
>
> Q: But you had no interest in her qualifications and her performance of her job.
>
> A: It wasn't relevant to this article.
>
> Q: Everything you knew was that she had done her job and done it well.
>
> A: Right.

(SF Vol. IV, pp. 322-323.)

### B. Preservation of Federal Questions Presented for Review

Elda Villarreal sought a judicial determination of her status as public official *vel non* before, during, and after the trial of this cause. Prior to trial, she sought a partial summary judgment that she was not a public figure for the purpose of her lawsuit. (Appendix B, 18a-22a.) The trial court overruled her motion. Prior to the submission of the jury charge and jury questions, she objected that, as a matter of law, she could not be a public official and that there was no evidence for a jury to conclude otherwise. (Appendix B, 23a-25a.) Following the jury's finding that she was a public official (Appendix C, 51a), Mrs. Villarreal filed her motion to disregard that jury finding. (Appendix B, 26a-34a.) Folowing the adverse judgments, she objected before the Texas Court of Appeals that she was not a public official. (Appendix B, 35a-42a.) Her objections were overruled at both the trial and appellate levels. (Appendix C, 5a-57a; Appendix A, 13a-14a.)

## REASONS FOR GRANTING THE WRIT

### I. DOES THE FREE PRESS CLAUSE OF THE FIRST AMENDMENT REQUIRE THE TRIAL AND APPELLATE COURTS TO DEFER TO A JURY'S CHARACTERIZATION OF A LIBELED PLAINTIFF AS A PUBLIC OFFICIAL?

The trial court allowed the jury to make the legal determination that Mrs. Villarreal was a public official, and the appeals court failed to undertake a *de novo* review of that determination. Instead, the court of appeals reviewed the jury's finding under a highly deferential standard which considered only the evidence and inferences which tended to support the jury's findings and disregarded all evidence and inferences to the contrary. (Appendix A, 3a.) This derogation of judicial responsibility conflicts directly with this Court's pronouncement

in *Rosenblatt v. Baer*, 383 U.S. 75 (1965), that "it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" *Id.* at 89.

The Texas Court of Appeals' holding also conflicts with holdings of the United States courts of appeals. In *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979), the Fifth Circuit wrote:

> We note furthermore that counsel is unable to cite any case in which a jury has been permitted to decide whether a plaintiff, as a matter of "constitutional fact," is a public figure. On the contrary, the question has always been held to be one for the court.

*Id.* at 429. That court reiterated its position in *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), *cert. denied*, 454 U.S. 964. There it noted:

> The Supreme Court has on numerous occasions, treated the public figure and public official questions as matters of law, for the trial court to decide. . . . Even if summary judgment were improper because of issues of fact that could only be resolved after evidentiary hearing, the trial court, not a jury, must determine whether the evidence showed that plaintiff was a public figure.

*Id.* at 379.

In *Marcone v. Penthouse Internat'l Magazine for Men*, 754 F.2d 1072 (3rd Cir. 1984), *cert. denied*, 474 U.S. 864 (1985), the Third Circuit held:

> The classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court.

*Id.* at 1081.

Counsel for Mrs. Villarreal correctly objected to the submission of the jury question inquiring as to her status as a public official "for the reason that it has been conclusively established as a matter of law in this cause that

Elda Villarreal was not a public official." (Appendix B, 24a.) Like malice, a defamed plaintiff's status as public official is an issue of constitutional law. *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S.Ct. 2678 (1989) (malice); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (apparently rejecting the notion "that the public-private issue is one of fact for the jury." 401 U.S. at 273.) The protection of Constitutional values and the state's interest in preventing attacks upon reputation are both diminished by making the "public official" determination anything other than a legal issue subject to *de novo* review by the appellate courts.

## II. DOES THE FREE PRESS CLAUSE OF THE FIRST AMENDMENT PROHIBIT A STATE FROM COMPENSATING A DEFAMED CHILD WELFARE AGENT WITHOUT SUPERVISORY OR POLICY RESPONSIBILITIES ON THE GROUNDS THAT SHE IS A PUBLIC OFFICIAL?

In the seminal case establishing a constitutional dimension to the law of defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court wrote:

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.

*Id.* at 283 n.23. Mrs. Villarreal asks this Court now to make that determination and permit the vindication of her good name.

In *New York Times*, this Court began the job of reconciling the competing interests of a state's need to prevent and redress attacks upon its citizen's reputations and the protection of the right of the press to engage in the "unfettered interchange of ideas" described in *Roth v. United States*, 354 U.S. 476, 484 (1957). *See Milkovich v. Lorain Journal Co.*, —— U.S. ——, 110 S.Ct. 2695, 2707 (1990). In order to accommodate those sometimes conflicting interests, the Court set down the rule that "public

officials" may not recover for defamatory statements regarding their official conduct in the absence of "malice" on the part of the defendant. *New York Times v. Sullivan*, 376 U.S. at 279-280. Because the plaintiff, an elected commissioner of the City of Montgomery, Alabama, was plainly a public official, the Court had no need to determine fully the scope of those protected as public officials.

This Court soon provided additional guidance on the scope of the "public official." In *Rosenblatt v. Baer*, 383 U.S. 75 (1965), the question presented concerned the "public official" status of the Supervisor of the Belknap County (New Hampshire) Recreation Area. The Court explained the grounds for its holding in the *New York Times* as being twofold:

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.

Given these interests, the Court went on to hold that

> [w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.

*Id.* at 86.

The Court did not insulate the non-malicious defamation of every government employee, and the opinion provided an important restriction on the scope of the "public official" defense:

> It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion

> would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, *entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.*

*Id.* at 87 n.13 (emphasis added). This limitation on the scope of the "public official" protection has remained a theme with this Court. "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

Mrs. Villarreal was not rendered a "public official" simply by virtue of the article which defamed her. The reporter "had no interest in her qualifications and her performance of her job" which would justify treating her as a "public official." Her job's requirement of client confidentiality deprived her of the "significantly greater access to the channels of effective communication and . . . opportunity to counteract false statements" that "public officials" typically enjoy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1973). Her low-ranking position removed her from the creation of policy, and she could scarcely take any action which did not require the specific approval of her supervisor. Unless mere public employment and newspaper publicity made her a "public official," Elda Villarreal was no public official.

This Court has tried to set standards "to chart the proper course between the Scylla of inadequately guaranteeing First Amendment protections and the Charybdis of diminishing an individual right to reputation." *Marcone v. Penthouse Internat'l Magazine for Men*, 754 F.2d at 1075. There are some bright beacons on those charts, but the waters remain difficult to navigate. *New York Times* holds that elected officials are public officials, and even candidates for public office are constitutionally compelled to suffer without recourse the harsh and sometimes

defamatory light of media publicity. *Monitor Patriot Co. v. Roy*, 401 U.S. at 271. Nevertheless, cases have held that elected officials are not public officials. *E.g., Guinn v. Texas Newspapers, Inc.*, 738 S.W.2d 303 (Tex. App.—Houston [14th Dist.] 1987, writ denied), *cert. denied*, —— U.S. ——, 109 S.Ct. 864 (1989). Protective services workers have been held both to be and not to be public officials. *Compare Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) (public official) *with Wilkinson v. Florida Adult Care Ass'n, Inc.*, 450 So.2d 1168 (Fla. App. 1984) (not a public official). Except for the scrutiny and discussion occasioned by the Corpus Christi Times' libelous story, Mrs. Villarreal need never have entered these waters. For her sake and for the sake of the numerous others similarly situated, this Court should accept this petition and fully consider the reaches of the media's "public official" defense.

## CONCLUSION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Appeals. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to reverse the judgment of the trial court and enter judgment in favor of Petitioner or for other relief consistent with this Court's ruling.

Respectfully submitted,

PAUL DODSON *
WHITE, HUSEMAN, PLETCHER & POWERS
P.O. Box 2707
Corpus Christi, TX 78473
(512) 883-3563

WILLIAM J. KOLB
500 Texas Commerce Plaza
Corpus Christi, TX 78470
(512) 884-9986

* Counsel of Record

# APPENDICES

## APPENDIX A

COURT OF APPEALS OF TEXAS
CORPUS CHRISTI

---

No. 13-89-197-CV

ELDA VILLARREAL,
*Appellant,*

v.

HARTE-HANKS COMMUNICATIONS, INC., *et al.*,
*Appellees.*

---

March 8, 1990

Rehearing Overruled April 19, 1990

William J. Kolb, Corpus Christi, for appellant.

Jorge C. Rangel, Rangel & Chriss, Corpus Christi, Mike A. Hatchell, Ramey, Flock, Hutchins & Jeffus, Tyler, David H. Donaldson, Graves, Daugherty, Hearon & Moody, Austin, for appellees.

Before NYE, C.J., KENNEDY and BENAVIDES, JJ.

### OPINION

NYE, Chief Justice.

This is a libel action. Appellant, Elda Villarreal, sued appellees, Harte-Hanks Communications, Inc., and Greg Fieg-Pizano, author of an article published on February 8, 1985 in the *Corpus Christi Times*, and several other entities. Appellant contended that this article dealing with her activities as a Child Protective Services (CPS) specialist with the Texas Department of Human

Resources (TDHR) was libelous. The jury determined that the article was substantially false and was defamatory, but was not published with malice. The jury found damages in the amount of $160,000.00. The trial court entered a take-nothing judgment favorable to appellees.

Plaintiff alleged that the newspaper article libeled her by stating in effect that she was not doing her job as a proper welfare agent. The portion of the allegedly libelous article that identifies appellant by name follows:

> Though police files dating to 1982 cite the 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25 [1985].

By point one, appellant complains that no evidence supports the trial court's submission of Special Question No. 7. This question asked the jury to determine whether on or before February 8, 1985, appellant was a "public official." [1] The jury answered that she was. By point two, appellant complains the trial court erred by overruling her motion to disregard unsupported and immaterial findings because "no evidence" supported the jury's answer to Question No. 7.

In considering "no evidence" and "insufficient evidence" points of error, we will follow the well-established test set forth in Calvert, *No Evidence and Insufficient Evi-*

---

[1] We have not been requested to determine whether the trial court erred by submitting this question on the ground that appellant's status as a "public official" is a legal question to be determined by the trial court. Generally, the trial judge has the duty in the first instance to determine whether the proof shows the allegedly libeled party to be a public official. *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966); *Meiners v. Moriarty*, 563 F.2d 343, 350-51 (7th Cir.1977); *Vazquez Rivera v. El Dia, Inc.*, 641 F.Supp. 668, 670 (D.P.R. 1986). Appellant did not object to the submission of the special issue question on this basis.

*dence Points of Error*, 38 Texas L.Rev. 361 (1960). In deciding a no evidence point, we consider only the evidence and inferences which tends to support the jury's findings and disregard all evidence and inferences to the contrary. A "no evidence" point must be sustained if there is a complete absence of, or no more than a scintilla of evidence which supports the verdict. *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 207 (Tex.1985); *Old Republic Insurance Co. v. Diaz*, 750 S.W.2d 807, 809 (Tex.App.—El Paso 1988, writ denied).

The First Amendment to the United States Constitution is premised on the belief that free and open debate on public issues must be protected from government interference. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957). If these goals are to be achieved, protection of expression cannot be limited to what is true. "[E]rroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963)). Consequently, the United States Supreme Court has placed limitations on the award of damages in defamation actions.

One such limitation is the rule established in *New York Times*, 376 U.S. at 279-80, 84 S.Ct. at 725-26 that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The *New York Times* Court has indicated that a showing of actual malice requires that the public official

provide "clear and convincing proof," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974), "that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

Two prerequisites must be met for the *New York Times* standard to apply. First, the plaintiff must be a public official for the purposes of the article, and second, the defamatory statements must relate to the plaintiff's official conduct. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 273-75, 91 S.Ct. 621, 626-27, 28 L.Ed.2d 35 (1971); *Garrison v. Louisiana*, 379 U.S. 64, 76-77, 85 S.Ct. 209, 216-17, 13 L.Ed.2d 125 (1964); *New York Times*, 376 U.S. at 283 n. 23, 84 S.Ct. at 728 n. 23.

In the instant case, the allegedly defamatory remarks relate to appellant's conduct while she was an employee with TDHR. Her status as a TDHR employee during the period discussed in the story is undisputed. Hence, the second prerequisite is satisfied.

Regarding the first prerequisite, we note that the *New York Times* Court had no occasion to determine how far down into the lower rank of government employees the "public official" designation would extend, and the Court did not specify categories of persons who would or would not be included. The respondent was an elected city commissioner and there was no question that he was a "public official." *New York Times*, 376 U.S. at 283, n. 23, 84 S.Ct. at 728 n. 23.

The United States Supreme Court has declined to pronounce an all-encompassing definition of who constitutes a public official or devise a formalistic test of how high on the ladder of public importance a particular government employee must stand in order to be subject to the public official scrutiny in libel actions. *Vazquez Rivera*, 641 F.Supp. at 671. In *Rosenblatt*, a minimum test requirement was established as follows:

> The public official designation applies *at the very least* to those among the hierarchy of government employees who *have, or appear to the public to have,* substantial responsibility for or control over the conduct of governmental affairs. (Emphasis added).

*Rosenblatt*, 383 U.S. at 85, 86 S.Ct. at 675. By way of elaboration on the "public official" definition, the Court stated:

> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.

*Rosenblatt*, 383 U.S. at 86, 86 S.Ct. at 676. (Footnotes omitted). Moreover, the *Rosenblatt* Court stated that a public official's "position" must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the charges in controversy. *Rosenblatt*, 383 U.S. at 86 n. 13, 86 S.Ct. at 676 n. 13.

While not every public employee is a public official, *Hutchison v. Proxmire*, 443 U.S. 111, 119 n. 8, 99 S.Ct. 2675, 2680 n. 8, 61 L.Ed.2d 411 (1979), the rule is not limited to the upper echelons of government. The scope of the public office rule extends "to anything which might touch on an official's fitness for office" including personal attributes such as "dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the individual's private character." *Garrison*, 379 U.S. at 77, 85 S.Ct. at 217.

The evidence shows that as a CPS specialist, appellant's primary duties consisted of investigating cases of alleged child abuse and neglect and providing services for the

children involved. The incident that led to the article follows. On January 23, 1985, appellant became aware of a complaint concerning the alleged abuse and neglect ot two children, N.G. and R.C. A supervisor requested appellant to conduct an investigation. Appellant initiated her investigation by interviewing school officials. She learned where R.C. and N.G. lived, and she informed the school officials that she would be "taking over" the investigation of the case. She told the school officials that if she had to remove the children, she would be in charge and would coordinate her actions with the school. She met with N.G. and with R.C.'s aunt. She told N.G. that by the following day, she and R.C. would be in foster care. Afterwards, appellant obtained approval from her supervisor to place the children in foster care.

The next day, appellant informed the police about the alleged abuse N.G. and R.C. had experienced, and she prepared and signed a petition for a suit affecting the parent-child relationship. She notified school officials that she would be taking R.C. and N.G. from school. She placed the children in foster care and prepared, with the assistance of the county attorney's office, a petition and affidavit in support of emergency orders. She had a judge review the paperwork and sign the orders. TDHR now had temporary managing conservatorship of the children. Appellant also arranged for the children to see a doctor.

On January 26, appellant drafted a service plan for the parents which identified the problems that needed to be corrected before they could regain custody of N.G. and R.C. Appellant testified that she drafted a service plan with the intent that the parents would have a difficult time regaining custody of N.G. and R.C. She took N.G. to a therapist and accompanied the police while they interviewed N.G. concerning the alleged abuse. She met with the children's attorney *ad litem* and they visited the children at the foster homes. She also attempted to

locate the children's parents. Appellant testified at the hearing which pertained to the placement of N.G. and R.C. On February 6, 1985, she assisted the police during their continuing investigation of the alleged abuse.

We conclude that to the people she dealt with, appellant had sufficient power to remove or cause children to be removed from their environment, place them in foster homes, and establish conditions governing the circumstances by which parents could regain custody of their children. Even though appellant may not have affected every citizen's life on a daily basis, she was engaged in a vital function of state government, i.e., the protection of its citizens. Appellant's activities had a significant impact on people's lives. Thus, she "appear[ed] to the public to have, substantial responsibilities for or control over the conduct of governmental affairs," and her responsibilities would reasonably lead the public to have an "independent interest" in her qualifications and performance "beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt*, 383 U.S. at 85-86, 86 S.Ct. at 675-76. Furthermore, we do not see how, in a society where child abuse is recognized as a burning issue, it can be argued that appellant is not a person occupying a post which invites the public scrutiny.

We, therefore, hold that the record before us shows that there is more than a scintilla of evidence to support the jury's determination that appellant, as a CPS specialist, was a public official. As such, her status meets the standards set out in *New York Times v. Sullivan*. When submitting a case on special issues, questions raised by the pleadings and the evidence must be submitted to the jury. Tex.R.Civ.P. 278. Appellant's status as a public official was raised by the evidence and, absent a different objection to the special issue, the trial court did not err by submitting Special Question No. 7 to the jury.

Our holding is consistent with other rulings on this same subject in Texas and in other jurisdictions. In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977), an engineer brought a libel action against the *Laredo Times*, alleging that a story in the newspaper attributed to him responsibility for a severe flooding problem in a local subdivision and intimated that he was guilty of impropriety by serving as both the elected county surveyor and a paid engineering consultant to the county. *Foster*, 541 S.W.2d at 811. The Supreme Court held that the defendant's summary judgment proof failed to show that the allegedly libelous statement related to Foster's official conduct as an elected county surveyor and that the proof failed to establish that Foster's position as consulting engineer was sufficiently important to render him a public official under *Rosenblatt*. *Foster*, 541 S.W.2d at 813-14. In determining that Foster's position as a consultant did not render him a public official, the Supreme Court noted that the subdivision controversy focused on the county commissioners rather than on Foster as the consultant, *Foster*, 541 S.W.2d at 813, and "that Foster had little authority to exercise on behalf of the County." He also could not authorize expenditure of public funds and had very little public contact. *Foster*, 541 S.W.2d at 813-14.

In *Houston Chronicle Publishing Co. v. Stewart*, 668 S.W.2d 727, 729 (Tex.App.—Houston [1st Dist.] 1983, writ dism'd), the appellate court held that a court reporter was not a "public official." The court stated that a court reporter does not possess the requisite "apparent importance" or "substantial responsibility for or control over the conduct of governmental affairs." *Stewart*, 668 S.W.2d at 729. *See also Guinn v. Texas Newspapers, Inc.*, 738 S.W.2d 303, 305 (Tex.App.—Houston [14th Dist.] 1987, writ denied) *cert. denied*, —— U.S. ——, 109 S.Ct. 864, 102 L.Ed.2d 988 (1989) (holding that

public official status does not include, as a matter of law, a person who was proven only to be an elected justice of the peace in his own community); *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845 (Tex.App.—Amarillo 1982, writ dism'd) (holding that an attorney, who was not a governmental officeholder at the time of the allegedly libelous broadcast and where the allegedly libelous broadcast did not discuss his previous performance as a special prosecutor, was not a public official); *Poe v. San Antonio Express-News Corp.*, 590 S.W.2d 537, 540 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.) (holding that a school teacher was not a public official).

Unlike the situation in *Foster*, appellant, by the nature of her duties, exercised authority on the State's behalf. She served as an investigator, she had authority to recommend whether children could be removed from their homes, she could physically remove children from their environments and place them in foster care, she could establish conditions governing the circumstances by which parents could regain custody of their children, and she provided services to abused and neglected children. She also had substantial public contact relating to her official duties. Appellant certainly had greater control over governmental affairs than a court reporter, school teacher, attorney or justice of the peace.

In *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn.1978), a case factually similar to the case at bar, the Tennessee Supreme Court held a junior social worker with the Tennessee Department of Human Services to be a public official. *Verran*, 569 S.W.2d at 443. The court stated that:

> Any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege.

*Verran*, 569 S.W.2d at 441. Other cases (though by no means an exhaustive list) holding persons to be public officials who are in similar employment positions as appellant are: *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191, 194-96 (Okla.1980) (license tag agent); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103-04 (Okla.1978) (grade school wrestling coach); *Ryan v. Dionne*, 28 Conn.Supp. 35, 248 A.2d 583, 585 (1968) (collector of delinquent taxes). We overrule appellant's first and second points of error.

By points three, four, five and six, appellant argues that the trial court erred by either submitting Special Question No. 8, or by overruling her motion to disregard the jury's answer to Question No. 8. This question asked the jury if the subject article "was a fair, true and impartial account of the activities of the Texas Department of Human Resources, the Corpus Christi Police Department and the Nueces County District Attorney's Office?" By points of error seven and eight, appellant contends the trial court erred by disregarding the jury's findings to special question numbers 1, 2, 3, 4, 5A and 5C and entering judgment for appellees because these findings were material and supported by the evidence. Questions 1, 2, 3, and 4 deal with whether the subject article was defamatory or substantially false as it pertained to appellant. Questions 5A and 5C are damage issues. Our disposition of points one and two determine these points of error. Therefore, we need not answer these points.

The judgment of the trial court is AFFIRMED.

KENNEDY, Justice, concurring.

I concur with the result reached by the majority for the sole reason that, as pointed out in the majority opinion, appellant did not preserve for our review the question of law concerning appellant's status as a public official.

FROM THE CLERK'S OFFICE
COURT OF APPEALS
CORPUS CHRISTI

---

THIRTEENTH SUPREME JUDICIAL DISTRICT

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

JUSTICES
NORMAN L. UTTER
NOAH KENNEDY
ROBERT J. SEERDEN
FORTUNATO P. BENAVIDES
J. BONNER DORSEY

DEPUTY CLERK
CATHY WILBORN

512-888-0416

March 8, 1990

Hon. William J. Kolb
Attorney at Law
500 Texas Commerce Plaza
Corpus Christi, TX 78470

Hon. Mike A. Hatchell
Ramey, Flock, Hutchins & Jeffus
P.O. Box 629
500 First Place
Tyler, TX 75710

Hon. Jorge C. Rangel
Rangel & Chriss
Attorneys at Law
P.O. Box 880
Corpus Christi, TX 78403

Hon. David H. Donaldson, Jr.
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
P.O. Box 98
Austin, TX 78767

Re: Cause No. 13-89-197-CV
Tr.Ct.No. 85-769-F
Elda Villarreal
v.
Harte-Hanks Communications, Inc., et al.

Dear Attorneys:

The judgment of the trial court in the above-referenced cause was AFFIRMED by this Court on this date.

Copies of the opinion and judgment are enclosed.

Very truly yours,

/s/ Beth Gray
BETH A. GRAY
Clerk

BAG:np
Enc.
cc: Hon. Mike Westergren, Presiding Judge
Hon. Oscar Soliz, District Clerk

COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

---

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the 8th day of March, 1990. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

---

CAUSE NO. 13-89-197-CV (Tr. Ct. No. 85-769-F)

ELDA VILLARREAL,
*Appellant,*

v.

HARTE-HANKS COMMUNICATIONS, INC., *et al.*,
*Appellees.*

On Appeal to this Court from Nueces County, Texas

---

JUDGMENT

On appeal from the 214th District Court of Nueces County, Texas, from a judgment signed January 16, 1989. Opinion by Chief Justice Paul W. Nye. Concurring opinion by Justice Noah Kennedy. Opinions ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on November 30, 1989, on oral argument, the record and briefs. These

having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, ELDA VILLARREAL.

Costs of the appeal are adjudged against appellant, ELDA VILLARREAL, and Carlos Valdez and Jose Valdez, as sureties on the cost bond. It is further ordered that this decision be certified below for observance.

* * * *

BETH A. GRAY, Clerk

COURT OF APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT

TENTH FLOOR

NUECES COUNTY COURTHOUSE

CORPUS CHRISTI, TX 78401

CHIEF JUSTICE
PAUL W. NYE

JUSTICES
NOAH KENNEDY
ROBERT J. SEERDEN
FORTUNATO P. BENAVIDES
J. BONNER DORSEY
WILLIAM H. KEYS

CLERK
BETH A. GRAY

DEPUTY CLERK
CATHY WILBORN

TELEPHONE: 512-888-0416

FAX: 512-888-0794

April 19, 1990

William J. Kolb
Attorney at Law
500 Texas Commerce Plaza
Corpus Christi, TX 78470

Jorge C. Rangel
Rangel & Chriss
Attorneys at Law
P.O. Box 880
Corpus Christi, TX 78403

Mike A. Hatchell
Ramey, Flock, Hutchins & Jeffus
P.O. Box 629
500 First Place
Tyler, TX 75710

David H. Donaldson, Jr.
Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
P.O. Box 98
Austin, TX 78767

RE: Case No. 13-89-00197-CV
Trial Court Case No. 85-769-F

STYLE: Villarreal, Elda
V: Harte-Hanks Communications, Inc., et al.

The appellant's motion for rehearing was overruled by this Court on this day.

Respectfully yours,

BETH A. GRAY, Clerk

By /s/ [Illegible]
Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, Texas 78711
John T. Adams, Clerk

October 31, 1990

Mr. William J. Kolb
Law Offices of William J. Kolb
500 Texas Commerce Plaza
Corpus Christi, TX 78470

Mr. Mike Hatchell
Ramey, Flock, Hutchins, Jeffus,
Crawford, Harper & Collins
P.O. Box 629
Tyler, TX 75710

Mr. David H. Donaldson, Jr.
Graves, Dougherty, Hearon
& Moody
Post Office Box 98
Austin, TX 78767

Mr. Jorge C. Rangel
Rangel & Chriss
P.O. Box 880
Corpus Christi, TX 78403

RE: Case No. C-9921

Style: ELDA VILLARREAL
v. HARTE-HANKS COMMUNICATIONS, INC., *et al.*

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

## APPENDIX B

IN THE DISTRICT COURT
347TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

---

No. 85-769-H

ELDA VILLARREAL

v.

HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GULF COAST BROADCASTING CO., d/b/a KRIS TV NEWS CENTER SIX, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, ROBERT E. RHODES, DOUGLAS E. CALDWELL and LINDA CHEEK

---

[Filed Nov. 23, 1987]

---

MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

ELDA VILLARREAL, Plaintiff moves for partial summary judgment against HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, ROBERT E. RHODES, GULF COAST BROADCASTING COMPANY, DOUGLAS E. CALDWELL and LINDA CHEEK and in support thereof shows:

I.

Defendants HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, ROBERT E. RHODES, GULF COAST BROADCASTING COMPANY, DOUGLAS E. CALDWELL and LINDA CHEEK have answered.

II.

There is no genuine issue as to any material fact necessary to establish that ELDA VILLARREAL is *not* a "public figure" for purposes of this lawsuit.

When a defense is shown to be without support, it may be stricken by a motion for summary judgment. *Travelers Indemnity Company v. Holt Machinery Company*, 554 S.W.2d 12, 15 (Tex. Civ. App.—El Paso 1977, no writ).

III.

In support of this motion Plaintiff relies upon the pleadings, the depositions, admissions and answers to interrogatories on file, together with the exhibits attached hereto.

IV.

In *Gertz v. Welch*, 418 U.S. 323 (1974) the Court held that there are two types of "public figure":

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and all contexts. More commonly, an individual voluntarily interjects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *In either case such persons assume special prominence in the resolution of public questions.* [Emphasis added]

The Court found that the plaintiff in *Gertz v. Welch* was not a public figure in that he "*did not thrust him-*

*self into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.*" [Emphasis added] 418 U.S. 323 at 352.

To achieve status as a public figure, a plaintiff must be involved in public controversy before the defamatory statement is published. *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F2d 944 (5th Cir. 1983).

Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. *Hutchinson v. Proxmire*, 443 U.S. 111, 130. (1979) There must be a "pre-existing controversy." *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980)

At her deposition, the pertinent excerpts of which are attached hereto, Linda Cheek testified that she had never heard the name Elda Villarreal prior to the day of the broadcasts the subject of this suit (Cheek Deposition p. 35 l. 21-25). Linda Cheek testified that she had never seen Elda Villarreal on television: "Never" (p. 38 l. 10-11). She had never read about her in the newspaper: "Never" (p. 38 l. 12-13). She had never seen her addressing public issues: "Never. No, I didn't know her." When asked if Elda Villarreal shaped events of concern to society at large, Ms. Cheek replied: "I don't know" (p. 33 l. 24). When asked: "Why don't you know?" She replied: "I haven't followed her career." (p. 34 l. 1). If, prior to the broadcasts the subject of this suit Elda Villarreal was a "public figure" it was news to Linda Cheek.

Greg Fieg-Pizano was similarly uninformed, even for a reporter, of Elda Villarreal's purported "public figure" status.

Q: You are—you have been a reporter and you are an editor and your profession is to deal in things of public interest, is it not?

A: Yes, it is.

Q: And prior to February 7, 1985, what public controversies had Elda Villarreal entered into that came to your attention?

A: I don't know that any came to my professional attention.

Q: What public issues had Elda Villarreal affected that were of significance to you as a professional newsperson?

A: I don't know.

* * * *

Q: Did you know her at all?

A: No, I didn't know her at all.

* * * *

Q: What had Elda Villarreal done or said prior to the time you picked up that offense report to relinquish her interest in the protection of her own good name?

A: I don't know. I don't know what you're talking about.

Q: Had she done anything that called attention to her?

A: I don't know.

(Deposition of Greg Fieg-Pizano p. 27 l. 17—p. 29 l. 9)

Defendants' judicial admissions in these depositions establish conclusively, as a matter of law, that ELDA VILLARREAL is not a "public figure". *Mendoza v. Fidelity and Guaranty Insurance Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). Defendants have sworn themselves out of court on this issue by clear, unequivocal testimony. *Mendoza* at 694.

WHEREFORE, Plaintiff requests that this matter be set for hearing, with notice to Defendants, and that upon completion of the hearing, the Court enter an order establishing that ELDA VILLARREAL is not a "public figure" for purposes of this lawsuit.

Respectfully submitted,

LAW OFFICES OF WILLIAM J. KOLB
780 First City Tower II
Corpus Christi, Texas 78478
(512) 884-9986

By /s/ William J. Kolb
WILLIAM J. KOLB
Attorney for Plaintiff
Bar Card No. 11663200

ORDER SETTING HEARING

The above motion is set for hearing on this 15th day of December, 1987, at 1:30 o'clock P.M., in the 347th District Court, Nueces County Courthouse, 901 Leopard, Corpus Christi, Texas.

SIGNED this —— day of ————————, 1987.

_____

Judge Presiding

[Certificate of Service Omitted in Printing]

[Attachments Deleted in Printing]

IN THE DISTRICT COURT
214TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

---

No. 85-769-F

ELDA VILLARREAL

vs.

HARTE-HANKS, *et al.*

STATEMENT OF FACTS

Volume IX

of

IX Volumes

TRIAL ON MERITS

November 9, 1988

* * * *

[1375] MR. KOLB: That's the only submission we have.

As far as objections to the charge, we would object to the submission of Question No. 7, for the reason that it has been conclusively established as a matter of law in this cause that Elda Villarreal was not a public official. She had no substantial responsibility for governmental affairs. She had [1376] no supervisory duties. She did not have a staff to supervise. She was not elected. She was not in a policy-making position. Her authority was limited to that of making a recommendation to a supervisor who if that recommendation were adopted then would authorize Mrs. Villarreal to take action. She had no independent authority and, therefore, as a matter of law, her position was not one that we would associate with the status of public official. She was not elected. There was no independent interest in her qualifications or performance of her job. We would respectfully suggest that the defendants are judicially estopped from submitting an issue on this basis, because the evidence conclusively shows that they had no interest in her qualifications and performance as they wrote this article; therefore, if at that time, the actionable moment they had no interest in her qualifications and performance, the reason for the *New York Times versus Sullivan* rule, to have a privilege for the criticism of the official conduct of a public official, is simply not there. They did not direct their attention to the manner in which she discharged her duties. If they had, they would have published the whole and full truth of the [1377] competent manner in which she did the job, which it was her job to do. There's no evidence that they had any knowledge of her, or any independent interest in her, or that there was any discussion of the person, Elda Villarreal, holding this position entirely a part from the scrutiny and discussions occasioned by the particular charges in controversy.

For those reasons, we would respectfully suggest that Elda Villarreal for purposes of this litigation is not a

public official as a matter of law, and that defendants are judicially estopped from asserting for purposes of this litigation that she is a public official, because all their evidence conclusively shows they had no interest in her qualifications and performance.

THE COURT: All right. Obviously, this question has been of considerable concern to the Court, but I believe the better practice is to submit it in this manner. So, consequently, I will overrule your objection. Do you have any other objections to the Court's proposed charge?

MR. KOLB: Yes, Your Honor.

THE COURT: Proceed.

MR. KOLB: We would object to the [1378] submission of Question No. 8, because there has been no evidence for its submission and a fact issue on it was not raised by the evidence here and it is not raised by the pleadings.

THE COURT: Overruled. Do you have any other objections?

MR. KOLB: This concludes plaintiff's objections to the charge.

* * * *

IN THE DISTRICT COURT
214TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

---

No. 85-769-F

ELDA VILLARREAL
v.
HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN, and ROBERT E. RHODES

---

[Filed Nov. 14, 1988]

## MOTION TO DISREGARD UNSUPPORTED AND IMMATERIAL FINDINGS PURSUANT TO T.R.C.P. 301

TO THE HONORABLE JUDGE OF SAID COURT:

ELDA VILLARREAL, Plaintiff in the above entitled and numbered cause, moves the Court to disregard the findings of the jury on Questions No. 7 and 8, and to enter judgment for Plaintiff upon the remaining findings of the jury, and as grounds therefore would show:

I.

Heretofore in the trial of this cause the Court submitted the case to the jury on Questions, and the jury returned their findings upon such Questions, which findings were received by the Court and filed and entered on the minutes of the Court. The questions submitted to the jury and the findings thereon are as follows:

QUESTION NO. 1

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was defamatory as it pertains to ELDA VILLARREAL at the time of publication?

Answer "Yes" or "No"

Answer: Yes

> In connection with this Question, you are instructed that you should give to the words their ordinary meaning as read and understood by persons of ordinary intelligence, and the test is what construction the average person or the general public would give to such statements.

If you have answered Question No. 1 "Yes," then answer Question No. 2. If you have answered Question No. 1 "No," do not answer Question No. 2.

QUESTION NO. 2

Do you find from a preponderance of the evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below should have known at the time of publication that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was defamatory as it pertains to ELDA VILLARREAL?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | Yes |
| | NICK JIMENEZ | Yes |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this Question, you are instructed that you should give to the words their ordinary meaning as read and understood by persons of ordinary intelligence, and the test is what construction the average person or the general public would give to such statements.

QUESTION NO. 3

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was substantially false as it pertains to ELDA VILLARREAL?

Answer "Yes" or "No"

Answer: Yes

In connection with this question, you are instructed that in order for a statement to be substantially false, it must lack substantial truth. For a statement to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the statement is judged in its ordinary meaning to the average reader of the publication.

If you have answered Question No. 3 "Yes," then answer Question No. 4. If you have answered Question No. 3 "No," do not answer Question No. 4.

QUESTION NO. 4

Do you find from a preponderance of the evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below should have known at the time of publication that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was substantially false as it pertains to ELDA VILLARREAL?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | Yes |
| | NICK JIMENEZ | No |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this question, you are instructed that in order for a statement to be substantially false, it must lack substantial truth. For a statement to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the statement is judged in its ordinary meaning to the average reader of the publication.

QUESTION NO. 5

What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence, would fairly and reasonably compensate ELDA VILLARREAL, for the damages, if any, proximately caused to her by the following statement in the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, as it pertains to ELDA VILLARREAL in context and taken as a whole:

> "Though police files dating to 1982 cite the 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25."

Consider the following elements of damages and none other, giving your answers in dollars and cents, if any, as to each element:

A. Mental pain and anguish, embarrassment and humiliation in the past:

Answer: $150,000.00

B. Mental pain and anguish, embarrassment and humiliation which in reasonable probability ELDA VILLARREAL will continue to suffer in the future:

Answer: 0

C. Injuries to character and reputation in the past:

Answer: $10,000.00

D. Injuries to character and reputation which in reasonable probability she will continue to suffer in the future:

Answer: 0

E. Loss of Earning Capacity:

Answer: 0

You are further instructed that in your response to this Question, damages, if any, may be awarded only as to injury proximately caused by the statement quoted above in this question from the article entitled "Child Welfare Has Long File On Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985.

You are further instructed that you may not award any damages caused by Plaintiff's participation in this lawsuit or the severed portion concerning the television defendants.

You may not award any damages for injury, if any, to the children as a result of the publicity.

You are instructed that in judging the alleged damages to ELDA VILLARREAL, you may consider in mitigation or reduction of those damages, if any, the facts and circumstances surrounding the publication at issue, the intention with which the publication at issue was made, and the effect of the February 14, 1985 article entitled "Child welfare worker praised for quick action".

If you find harm was proximately caused by the statement in the article, but that harm was not substantial, your award of compensatory damages to ELDA VILLARREAL, if you award any such damages, may be in a nominal or token amount.

QUESTION NO. 6

Do you find by clear and convincing evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below published the statement:

> "Though police files dating to 1982 cite the 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25."

in the article entitled "Child Welfare Has Long File On Sisters" in the second edition of the *Corpus Christi Times* on February 8, 1985 with reckless disregard for the truth?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | No |
| | NICK JIMENEZ | No |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this question, you are instructed that the burden of proof on this question is by clear and convincing evidence. CLEAR AND CONVINCING EVIDENCE means that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

You are further instructed that "reckless disregard for the truth" means publication with a high degree of awareness of probable falsity. Reckless

disregard for the truth means publication when defendant in fact entertained serious doubts as to the truth of the publication.

QUESTION NO. 7

Do you find, from a preponderance of the evidence, that on or, before February 8, 1985, ELDA VILLARREAL was a "Public Official"?

Answer "Yes or No"

Answer: Yes

You are instructed in connection with this question that a "Public Official" may be an elected official, a full-time public employee or temporary public employee whose position possesses such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. Such importance can be shown by the amount of public interest in the activity, the amount of authority exercised on behalf of the governmental agency, the amount of discretion that the job requires, whether the person supervises other employees of the governing agency, and whether the person acts as a representative of the governmental agency.

The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

QUESTION NO. 8

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File On Sisters" published in the second edition of the Corpus

Christi Times on February 8, 1985 was a fair, true and impartial account of the activities of the Texas Department of Human Resources, the Corpus Christi Police Department and the Nueces County District Attorney's Office?

Answer "Yes or No"

Answer: Yes

In connection with this question, you are instructed that in order for an account to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the account is judged in its ordinary meaning to the average reader of the publication.

II.

The jury's answer in response to Question No. 7 should be disregarded because the question of "public official" status is a question of law and the evidence adduced during trial conclusively established that Plaintiff is not a public official. Therefore the jury's finding in response to Question No. 7 should be disregarded because it is immaterial and has no support in the evidence.

The jury's answer in response to Question No. 8 should be disregarded because the finding is immaterial and has no support in the evidence. Plaintiff objected to the submission of Question No. 8 because there was no evidence raising a fact issue to justify its submission and furthermore, all the evidence adduced during trial conclusively established the contrary: that the false and defamatory statement which the jury found these Defendants should have known was false and defamatory was attributable to Defendants' negligence and could not be attributed to anything said by anyone else during "an official proceeding, other than a judicial proceeding, to administer the law." That is why Plaintiff objected to the submission of this question. There is no evidence in

this record that the false and defamatory statement sued upon can be attributed to anyone other than Defendants herein.

III.

WHEREFORE, Plaintiff requests that notice of this motion be given as required by law, that on hearing of the same the findings of the jury in answer to Questions No. 7 and 8 be disregarded, that judgment be entered for Plaintiff upon the remaining findings of the jury, and that such other and further relief be granted, at law or in equity, as to which movant may by this motion or proper amendment thereto show herself justly entitled.

Respectfully submitted,

LAW OFFICES OF WILLIAM J. KOLB
500 Texas Commerce Plaza
Corpus Christi, Texas 78470
(512) 884-9986

By /s/ William J. Kolb
WILLIAM J. KOLB
Attorney for Plaintiff
Bar Card No. 11663200

NOTICE SETTING HEARING

The above motion is set for hearing on this 23rd day of November, 1988, at 3:00 o'clock P.M., in the 214th District Court, Nueces County Courthouse, 901 Leopard, Corpus Christi, Texas.

SIGNED this 10th day of Nov., 1988.

/s/ [Illegible]
Judge Presiding

[Certificate of Service Omitted in Printing]

[Excerpts from Brief of Appellant No. B-89-00197-CY In the Court of Appeals for the 13th Judicial District of Texas at Corpus Christi]

## POINT OF ERROR ONE RESTATED FOR ARGUMENT

## POINT OF ERROR ONE

THE TRIAL COURT ERRED IN SUBMITTING QUESTION NO. 7 (TR. 42) TO THE JURY OVER PLAINTIFF'S OBJECTION (SF Vol. IX, p. 1375-1376) BECAUSE THERE WAS NO EVIDENCE TO WARRANT ITS SUBMISSION.

## ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR ONE

Question No. 7 asked the jury to determine whether "on or before February 8, 1985, ELDA VILLARREAL was a 'Public Official.'" (TR. 42).

The United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1966) held that a State cannot award damages to a public official for a defamatory falsehood relating to his official conduct unless the official proves actual malice, i.e., that the falsehood was published with knowledge of its falsity or with reckless disregard for whether it was true or false. The Court did not determine, in that case, "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S. at 283 n. 23. The Court held only that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283; U.S. CONST. AMENDS. I, XIV.

The Court in *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966), held that "as is the case with questions of privilege gen-

erally it is for the *trial judge* in the first instance to determine whether the proofs show" a litigant to be a "public official." (Emphasis added). That determination is to be independently reviewed on appeal. *Id.* at 88 n. 15.

The Court in *Rosenblatt* stated that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Id.* at 86. However, "there is tension between this interest and the values nurtured by the First and Fourteenth Amendments." *Id.* at 86. The Court went on to state that "where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the *New York Times* malice standards apply." *Id.* at 86. The Court further clarified its position in a footnote:

> It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public interest, that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

*Id.* at 85 n. 13.

While a plaintiff's status as a public official is a question of law to be determined in the first instance by the trial judge, the trial court may submit to the jury component fact issues relating to the existence of the privilege. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 816 n. 10. (Tex. 1976). However, a special issue should

not be submitted to the jury when it is conclusively established or it can be answered as a matter of law from undisputed facts. *American Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 127 (Tex. App.—San Antonio 1984, no writ). It is unnecessary to obtain findings on uncontroverted matters. *Equitable Trust Company v. Roland*, 721 S.W.2d 530, 534 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

Plaintiff objected to the submission of Question No. 7 at the Charge Conference for the reason that:

> it has been conclusively established as a matter of law in this cause that Elda Villarreal was not a public official. She had no substantial responsibility for governmental affairs. [SF Vol. III, p. 162-163]. She had no supervisory duties. [SF Vol. III, p. 150.] She did not have a staff to supervise. [SF Vol. III, p. 183, Vol. VIII, p. 990-994]. She was not elected. [SF Vol. VIII, p. 1153]. She was not in a policy making position. [SF Vol. III, p. 162]. Her authority was limited to that of making a recommendation to a supervisor who if that recommendation were adopted then would authorize Mrs. Villarreal to take action. [SF Vol. VII, p. 968-970]. She had no independent authority and, therefore, as a matter of law, her position was not one that we would associate with the status of a public official. [SF Vol. VIII, p. 994, 1022-1024]. She was not elected. [SF Vol. VIII, p. 1153]. There was no independent interest in her qualifications or performance of her job. [SF Vol. IV, p. 323]. We would respectfully suggest that the defendants are judicially estopped from submitting an issue on this basis, because the evidence conclusively shows that they had no interest in her qualifications and performance as they wrote this article, therefore, if at that time, the actionable moment they had no interest in her qualifications and performance, the reason for the *New York Times versus*

> *Sullivan* rule, to have a privilege for the criticism of the official conduct of a public official is simply not there. [SF Vol. IV, p. 323]. They did not direct their attention to the manner in which she discharged her duties. [SF Vol. V, p. 465]. If they had, they would have published the whole and full truth of the competent manner in which she did the job, which it was her job to do. [SF Vol. IV, p. 325]. There's no evidence that they had any knowledge of her, or any independent interest in her, or that there was any discussion of the person, Elda Villarreal, entirely apart form the scrutiny and discussions occasioned by the particular charges in controversy. [SF Vol. IV, p. 346].
>
> For those reasons, we would respectfully suggest that Elda Villarreal for purposes of this litigation is not a public official as a matter of law, and that defendants are judicially estopped from asserting for purposes of this litigation that she is a public official, because all their evidence conclusively shows they had no interest in her qualifications and performance.

(Plaintiff's Objections to the Charge, SF Vol. IX, p. 1375-1377).

The objection was overruled by the trial court and Question No. 7 was submitted to the jury. (SF Vol. IX, p. 1377).

The question clearly presented by this case is whether public employment alone, absent any of the other indicia of the status of a "public official" is sufficient to deny a plaintiff recovery, after a full trial on the merits, for damages to her reputation and for mental pain, embarrassment and humiliation.

Status as a public official "must, in the last analysis, be dependent not only upon title or some convenient nomenclature, but also upon the character, nature, purpose,

intent and extent of his participation in the particular controversy." *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978). The *Verran* case dealt with a social worker who, *unlike* Elda Villarreal, apparently "had sufficient power to remove or cause . . . children to be taken from custody and placed in a foster home." The *Verran* case was an appeal from the granting of a summary judgment holding that the plaintiff was a public official. The Supreme Court of Tennessee affirmed the trial court, in a decision based on the Constitution of the State of Tennessee. *Id.* at 441. The Supreme Court of Tennessee focused not on "some convenient nomenclature" but on the independent authority of the plaintiff to investigate allegations of child abuse and to remove children from their parents. *Id.* at 443. In the instant case, the record clearly and unequivocally demonstrates that Elda Villarreal did not have this independent authority. (SF Vol. III, p. 155-156; Vol. III, p. 156-157, Vol. III, p. 150; Vol. VII, p. 944; Vol. III, p. 183; Vol. VIII, p. 990-994; SF Vol. VII, p. 947-950; Vol. VII, p. 968; Vol. VII, p. 970; Vol. VIII, p. 993).

In addition, the *Verran* case grew out of a series of ten newspaper articles "all relating to the actions and activities of plaintiff in connection with the performance of her official duties" *Verran*, 569 S.W.2d at 437. In contrast, defendant FIEG-PIZANO had no interest in Elda Villarreal's "qualifications and her performance of her job" because "it wasn't relevant to this article," (SF Vol. IV, p. 323), and it "wasn't a story about Elda." (SF Vol. IV, p. 325).

In *Wilkinson v. Florida Adult Care Association, Incorporated*, 450 So. 2d 1168 (Fla. 2d DCA 1984), the Second District Court of Appeal of Florida reversed a directed verdict rendered against a plaintiff social worker in a defamation case. The court held that the plaintiff was not a public official because: 1) he "was not [able] to initiate an investigation . . . himself;" 2) "he was not

involved in formulating policy;" 3) "he handled no public funds;" 4) "he worked under the direction of a supervisor;" 5) "we find no independent public interest in appellant's qualifications as an ACLF coordinator;" 6) "his position did not appear to be one that called for public scrutiny other than that generated from the instant controversy;" 7) his "status seemed to be one of a mid-level employee monitoring state licensees within the extended HRS hierarchy;" and 8) "even his participation in the licensure process was by way of recommendation." *Wilkinson*, 450 So.2d at 1172-73.

Elda Villarreal's participation in the process of child protection was "by way of recommendation." (SF Vol. VII, p. 968). She did not have the authority to initiate an investigation. (SF Vol. VII, p. 944). Her dealings with the public were governed by strict confidentiality guidelines. (SF Vol. III, p. 100, 153-154). Moreover, the timely and competent manner in which Elda Villarreal discharged her duties was not a "necessary piece of information" to reporter Fieg-Pizano because the article for which he claims a constitutional privilege "was not about Elda Villarreal;" the very "official" whose conduct he now purports to have criticized in the article complained of. (SF Vol. V, p. 465). *See Guinn v. Texas Newspapers, Inc.*, 738 S.W. 2d 303, 305 (Tex App.—Houston [14th Dist.] 1987), *cert. denied*, 109 S.Ct. 864 (1989).

The record in this case, comprising 1394 pages from opening statement through verdict, is singularly devoid of so much as a syllable of testimony or evidence establishing that Elda Villarreal possessed any of the indicia or attributes of a "public official." Under these circumstances it was clearly error for the trial court to submit this question to the jury when the undisputed and uncontroverted facts clearly established that Elda Villarreal was not a "public official" as a matter of law. *See Gonzalez v. Texas Department of Human Resources*, 581 S.W. 522, 527 (Tex. App.—Corpus Christi 1979, writ ref'd n.r.e.).

A review of the evidence in the light most favorable to support this finding reveals only "a statement defamatory of some person in government employ." *Rosenblatt* 383 U.S. at 85 n. 13. To hold that this alone constitutes legally sufficient evidence of "public official" status, as the trial court did, "would virtually disregard society's interest in protecting reputation." *Id.* at 85 n. 13; *see also Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

## POINT OF ERROR TWO RESTATED FOR ARGUMENT

## POINT OF ERROR TWO

THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF'S MOTION TO DISREGARD UNSUPPORTED AND IMMATERIAL FINDINGS (TR.47) AS IT PERTAINS TO QUESTION NO. 7 BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE JURY'S ANSWER TO THAT QUESTION. (TR. 42).

## ARGUMENT AND AUTHORITIES UNDER POINT OF ERROR TWO

Plaintiff moved the trial court to disregard the jury's finding that Elda Villarreal was a "public official" in response to Question No. 7 because it is immaterial and has no support in the evidence. (Tr. 55). The trial court overruled the motion and entered judgment for defendants. (Tr. 75).

In ruling on a motion to disregard jury findings, the trial court must consider all testimony in the light most favorable to the party against whom the motion is sought, and every reasonable intendment deducible from the evidence is to be indulged in that party's favor. *Johnston Sales Co. v. Lizana*, 513 S.W.2d 879, 881 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

Viewing the record in this light, we find that defendant Fieg-Pizano: 1) had never heard Plaintiff's name before he wrote the article which defamed her, (SF Vol. IV, p. 251-252); 2) was not aware of any public events, issues or controversies in which her participation received public attention, (SF Vol. IV, p. 252); 3) had no interest in her qualifications and performance of her job, (SF Vol. IV, p. 323); and 4) was uninterested in her qualifications and performance of her job because the article which destroyed her reputation "was not an article about Elda Villarreal." (SF Vol. IV, p. 376-377). The evidence shows that Elda Villarreal did not: 1) make policy, (SF Vol. III, p. 162); 2) handle public funds, (SF Vol. III, p. 162); 3) interject herself into public issues, (SF Vol. III, p. 162); 4) initiate investigations, (SF Vol. VII, p. 944); 5) take any action that was not previously approved by her supervisors, (SF Vol. VII, p. 943, Vol. VIII, 1173); 6) depart from strict "policy and procedure," (SF Vol. III, p. 183); or 7) fail to adhere to stringent confidentiality guidelines in her handling of this case. (SF Vol. VIII, p. 1034-1035). There is no evidence in this record to indicate that Elda Villarreal's position was "one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt v. Baer*, 383 U.S. at 85 n.13. Defendant Fieg-Pizano had no interest in her performanc and qualifications even as they pertained to the "charges in controversy." There is no evidence in this record to indicate anything other than defendants' indifference to the qualifications and performance of the "public official" they now assert it was their constitutional privilege to defame. The jury's finding in response to question No. 7 was without support in the evidence and therefore should have been disregarded. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

## APPENDIX C

IN THE DISTRICT COURT
214TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

---

No. 85-769-F

ELDA VILLARREAL

v.

CALLER TIMES PUBLISHING COMPANY,
GREG FIEG-PIZANO, ROBERT E. RHODES

---

[Filed November 11, 1988]

## CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such

exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to an answer made by the verdict, those jurors who

agree to all the findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in questions in a sense which varies from the meaning commonly understood, you will be given in this charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

The questions usually begin with the phrase, "Do you find from a preponderance of the evidence" that a certain event, act, omission, or transaction took place. "PREPONDERANCE OF THE EVIDENCE" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; in order to be a proximate cause, the act or omission complained of much be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

You are instructed that "DEFAMATORY" means a statement, either spoken (slander) or written (libel), tending to injure a person's reputation and thereby ex-

pose her to public hatred, contempt or ridicule, or financial injury, or to impeach her honesty, integrity, virtue or reputation. In considering whether the statement is defamatory, the words used must be construed as a whole, taken in context, giving to all the words contained therein their ordinary meaning as heard or read, and as construed by persons of ordinary intelligence.

You are further instructed that any statement or statements which impute to ELDA VILLARREAL the commission of a crime for which she could be punished by imprisonment, or which reflect adversely on her performance of her profession or occupation are considered defamatory.

You should consider and decide this case as an action between persons of equal standing in the community of equal worth and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

QUESTION NO. 1

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was defamatory as it pertains to ELDA VILLARREAL at the time of publication?

Answer "Yes" or "No"

Answer: Yes

In connection with this Question, you are instructed that you should give to the words their ordinary meaning as read and understood by persons of ordinary intelligence, and the test is what construction

the average person or the general public would give to such statements.

If you have answered Question No. 1 "Yes," then answer Question No. 2. If you have answered Question No. 1 "No," do not answer Question No. 2.

QUESTION NO. 2

Do you find from a preponderance of the evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below should have known at the time of publication that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was defamatory as it pertains to ELDA VILLARREAL?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | Yes |
| | NICK JIMENEZ | Yes |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this Question, you are instructed that you should give to the words their ordinary meaning as read and understood by persons of ordinary intelligence, and the test is what construction the average person or the general public would give to such statements.

QUESTION NO. 3

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was substantially false as it pertains to ELDA VILLARREAL?

Answer "Yes" or "No"

Answer: Yes

In connection with this question, you are instructed that in order for a statement to be substantially false, it must lack substantial truth. For a statement to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the statement is judged in its ordinary meaning to the average reader of the publication.

If you have answered Question No. 3 "Yes," then answer Question No. 4. If you have answered Question No. 3 "No," do not answer Question No. 4.

QUESTION NO. 4

Do you find from a preponderance of the evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below should have known at the time of publication that the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985, taken as a whole, was substantially false as it pertains to ELDA VILLARREAL?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | Yes |
| | NICK JIMENEZ | No |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this question, you are instructed that in order for a statement to be substantially false, it must lack substantial truth. For a statement to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the statement is judged in its ordinary meaning to the average reader of the publication.

QUESTION NO. 5

What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence, would fairly and reasonably compensate ELDA VILLARREAL, for the damages, if any, proximately caused to her by the following statement in the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985 as it pertains to ELDA VILLARREAL in context and taken as a whole:

> "Though police files dating to 1982 cite the 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25."

Consider the following elements of damages and none other, giving your answers in dollars and cents, if any, as to each element:

A. Mental pain and anguish, embarrassment and humiliation in the past:

Answer: $150,000.00

B. Mental pain and anguish, embarrassment and humiliation which in reasonable probability ELDA VILLARREAL will continue to suffer in the future:

Answer: 0

C. Injuries to character and reputation in the past:

Answer: $10,000.00

D. Injuries to character and reputation which in reasonable probability she will continue to suffer in the future:

Answer: 0

E. Loss of Earning Capacity:

Answer: 0

You are further instructed that in your response to this Question, damages, if any, may be awarded only as to injury proximately caused by the statement quoted above in this question from the article entitled "Child Welfare Has Long File on Sisters" published in the second edition of the *Corpus Christi Times* on February 8, 1985.

You are further instructed that you may not award any damages caused by Plaintiff's participation in this lawsuit or the severed portion concerning the television defendants.

You may not award any damages for injury, if any, to the children as a result of the publicity.

You are instructed that in judging the alleged damages to ELDA VILLARREAL, you may consider in mitigation or reduction of those damages, if any, the facts and circumstances surrounding the publication at issue, the intention with which the publication at issue was made, and the effect of the February 14, 1985 article entitled "Child welfare worker praised for quick action".

If you find harm was proximately caused by the statement in the article, but that harm was not substantial, your award of compensatory damages to ELDA VILLARREAL, if you award any such damages, may be in a nominal or token amount.

QUESTION NO. 6

Do you find by clear and convincing evidence that any of the employees of Defendant CALLER TIMES PUBLISHING COMPANY listed below published the statement:

> "Though police files dating to 1982 cite the 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25."

in the article entitled "Child Welfare Has Long File On Sisters" in the second edition of the *Corpus Christi Times* on February 8, 1985 with reckless disregard for the truth?

Answer as to each separately: "Yes" or "No".

| | | |
|---|---|---|
| Answer: | GREG FIEG-PIZANO | No |
| | NICK JIMENEZ | No |
| | JOY ROPER | No |
| | WILLIAM DUNCAN | No |
| | ROBERT E. RHODES | No |

In connection with this question, you are instructed that the burden of proof on this question is by clear and convincing evidence. CLEAR AND CONVINCING EVIDENCE means that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

You are further instructed that "reckless disregard for the truth" means publication with a high degree of awareness of probable falsity. Reckless disregard for the truth means publication when defendant in fact entertained serious doubts as to the truth of the publication.

QUESTION NO. 7

Do you find, from a preponderance of the evidence, that on or, before February 8, 1985, ELDA VILLARREAL was a "Public Official"?

Answer: "Yes or No"

Answer: Yes

You are instructed in connection with this question that a "Public Official" may be an elected official, a full-time public employee or temporary public employee whose position possesses such apparent importance that the public has an independent interest

in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees. Such importance can be shown by the amount of public interest in the activity, the amount of authority exercised on behalf of the governmental agency, the amount of discretion that the job requires, whether the person supervises other employees of the governing agency, and whether the person acts as a representative of the governmental agency.

The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

QUESTION NO. 8

Do you find from a preponderance of the evidence that the article entitled "Child Welfare Has Long File On Sisters" published in the second edition of the Corpus Christi Times on February 8, 1985 was a fair, true and impartial account of the activities of the Texas Department of Human Resources, the Corpus Christi Police Department and the Nueces County District Attorney's Office?

Answer "Yes or No"

Answer: Yes

In connection with this question, you are instructed that in order for an account to be true, it need not be literally or absolutely true, but only substantially true. The truth or falsity of the account is judged in its ordinary meaning to the average reader of the publication.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud

and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations;
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the Judge;
4. to vote on the questions;
5. to write your answers to the questions in the spaces provided; and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the Courthouse, at your home, or elsewhere, please inform the Judge of that fact.

When you have answered all the questions you are required to answer under the instructions of the Judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ Mike Westergren
Judge Presiding

Filed Nov. 10, 1988 11:45 am

*CERTIFICATE*

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the Presiding juror, if unanimous)

_____

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

/s/ J. A. Davis

/s/ Oscar Puento

/s/ Aurara Burkhalter

/s/ Illegible

/s/ Elodia C. Rea

/s/ Illegible

/s/ Beverly Poplin

/s/ Daniel Sanchez

/s/ Jose Antonio Zapata

/s/ Delia Gonzalez

Filed Nov. 11, 1988 12:17 pm

IN THE DISTRICT COURT
214TH JUDICIAL DISTRICT
NUECES COUNTY, TEXAS

---

Cause No. 85-769-F

ELDA VILLARREAL

vs.

HARTE-HANKS COMMUNICATIONS, INC., CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO AND ROBERT E. RHODES, EDWARD H. HARTE AND STEPHEN W. SULLIVAN

---

FINAL JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

On the 31st day of October, 1988, came on to be heard the above-entitled and numbered cause and ELDA VILLARREAL, the Plaintiff, appeared in person and by attorney of record and announced ready for trial, and HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN and ROBERT E. RHODES, the Defendants, appeared in person and by attorney of record and announced ready for trial, and a jury having been previously demanded, a jury consisting of 12 good and lawful jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the Plaintiff's evidence, the Defendants, HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, STEPHEN W. SULLIVAN, GREG FIEG-PIZANO and ROBERT E. RHODES, moved for an instructed verdict. The Court, having considered the motion, granted the motion for instructed verdict as to De-

fendants EDWARD H. HARTE and STEPHEN W. SULLIVAN only.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the motion for instructed verdict of Defendants EDWARD H. HARTE and STEPHEN W. SULLIVAN be and the same is hereby GRANTED.

At the conclusion of all the evidence, and after the parties had rested and closed, Defendants moved for an instructed verdict. The Court denied the motion. The Court submitted the case to the jury on questions. The charge of the Court, including the questions submitted to the jury, and the verdict of the jury are incorporated herein for all purposes by reference.

After the jury returned its verdict, Plaintiff moved the Court to disregard findings of the jury on Questions Nos. 7 and 8 and to enter judgment in favor of Plaintiff on the remaining findings of the jury; Defendants moved the Court to enter judgment on the findings of the jury in favor of Defendants and against Plaintiff and alternatively to disregard the "yes" findings of the jury in response to Questions Nos. 1, 2, 3, 4, and the affirmative findings in response to Questions Nos. 5(a) and 5(c). The Court finds, having considered the motions of Plaintiff and Defendants, and it appearing to the Court that the verdict of the jury was for the Defendants and against the Plaintiff, that judgment should be rendered and entered upon the verdict in favor of the Defendants and against the Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court, that the motion of Defendants HARTE-HANKS COMMUNICATIONS, INC., CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO and ROBERT E. RHODES for judgment on the verdict be and the same is hereby GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court, that the motion of Defendants HARTE-HANKS COMMUNICATIONS, INC., CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO and ROBERT E. RHODES to disregard the "yes" findings of the jury in response to Questions Nos. 1, 2, 3, 4, and the affirmative findings in responses to Questions 5(a) and 5(c) be and the same is hereby GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that the motion of Plaintiff to disregard jury findings and for judgment on the verdict be, and the same is hereby DENIED.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED by the Court that the Plaintiff, ELDA VILLARREAL, take nothing by her suit against Defendants HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN and ROBERT E. RHODES, and that Defendants HARTE-HANKS COMMUNICATIONS, INC., EDWARD H. HARTE, CALLER-TIMES PUBLISHING COMPANY, GREG FIEG-PIZANO, STEPHEN W. SULLIVAN and ROBERT E. RHODES be in all things discharged and go hence without day. All costs of Court are taxed against the Plaintiff, ELDA VILLARREAL, for which let execution issue.

All other relief not expressly granted herein is denied.

SIGNED this 16 day of January, 1989.

/s/ Mike Westergren
Judge Presiding

## APPENDIX D

## PLAINTIFF'S EXHIBIT 5

From CORPUS CHRISTI TIMES, 2nd edition, February 8, 1985

Page A1

"Child welfare has long file on sisters"
By Greg Fieg-Pizano

Two little girls said to have been prostituted for beer and money at South Port Avenue barrooms have been under investigation by welfare agents for six years, police files show.

Because the children were not taken into protective custody until now, the district attorney said he would try to determine why.

Files show that a 12-year-old girl—said by witnesses to have engaged in sexual activity in an alley with two men—had contracted gonorrhea at age 5.

Her 10-year-old sister was offered to men in South Port Avenue barrooms who were permitted to fondle her in exchange for beer, Police Sgt. C. H. Roberts said.

"It was all part of the act," Roberts said.

Criminal charges are being contemplated against their parents, Adela Castillo Garcia, 37, and Manual Reyes Garcia, 41, who have had a series of addresses in the South Port Avenue and Agnes Street area.

The couple was named in a Jan. 25 court petition filed by welfare agents to take the children into state custody.

"Child welfare has had an open case on these children since 1978," Police Sgt. Hugo Stimmler said in an offense report disclosed yesterday.

Consideration of criminal charges stems from witnesses' reports that that money or beer given to the girls for prostitution was turned over to adult family members.

"I'm sure," District Attorney Grant Jones said, "we'll have a warrant before the day is over. We're going to look at that case very closely. That seems to be a very serious case."

Jones said he would investigate what appears to have been slow or unresponsive reaction by child welfare investigators, a subject the investigators would not discuss with the Times.

Though police files dating to 1982 cite that 12-year-old as a shoplifter, runaway and curfew violator, welfare agent Elda Villarreal did not petition the court to remove the children until Jan. 25.

Judge Rene Haas of the 94th District Court ordered that the state take temporary custody on Jan. 29, and appointed attorney Patrick J. McGuire to represent the parents.

McGuire denied accusations of child neglect and requested a court hearing, the date of which has not been set.

Villarreal said in court documents that welfare agents have made extended efforts to keep the family together, but the agents would not comment on why they had waited until now to take the children.

"The only thing I can tell you is we cannot discuss specific cases. We cannot even acknowledge whether we have a case or not," said Bill Royce, a state child protective service supervisor.

He deferred comment to investigator Sylvia Flory, who was described as overseeing the incidents involving the two little girls.

She also would not discuss the case, nor would she answer general questions regarding policies and limitations of her authority to intervene in child abuse cases.

"I'm not going to respond to general questions," she said.

Details of the 1978 reports to state officials were not disclosed, but a report of an examination showed that both sisters have perforated hymens and enlarged vaginas, the apparent result of sexual intercourse.

*Please see Child Sex/2A*

A court-appointed attorney for the children, Elizabeth Gyger, said she expected the children would be permanently removed.

"At this time I would rather anticipate that we would begin termination proceedings. I would oppose their return to their parents at any time in the future," Ms. Gyger said.

State law permits authorities to petition courts for the removal of the children from their parents if the parents "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

"Engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

"Termination (of the parent-child relationship) is in the best interest of the child."

Files dating to September 1984 showed the 12-year-old had repeatedly been sighted loitering outside at least a half-dozen bars in the parents' neighborhood, Police Cmdr. O.B. Bell said.

Sometimes reports were filed and sometimes not, Bell said.

The 12-year-old first encountered police at age 9, when she was picked up on a shoplifting charge, but was returned to her parents because police said no evidence of child abuse was outwardly evident.

On Sept. 9, 1984, her mother reported her missing and again she was picked up by police and returned home. No outward evidence of child abuse was apparent, police said.

On Sept. 19, 1984, and Sept. 30, 1984, she was missing again and was returned.

On Oct. 11, 1984, police found her loitering outside a South Port Avenue barroom and turned her over to Martineau Juvenile Hall.

A spokesman for the juvenile hall said he was prohibited from disclosing whether welfare officials were notified at that time.

However, police found her talking to a bartender in the doorway of a barroom again on Nov. 13, 1984. They returned her to her parents and directly reported the situation to welfare officials.

Finally witnesses came forth over the past two weeks, and welfare officials turned the case over to police.